1-31-2012

State v. Ormesher Appellant's Brief Dckt. 38699

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38699
	)	
v.	)	
	)	
KEVIN LOUIS ORMESHER,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE JOHN T. MITCHELL
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. # 5867

JUSTIN M. CURTIS
Deputy State Appellate Public Defender
I.S.B. # 6406
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
DEFENDANT-APPELLANT

ATTORNEY FOR
PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

STATEMENT OF THE CASE

Nature of the Case

Kevin Louis Ormesher appeals from his judgment of conviction for sexual abuse of a minor. He asserts that the district court erred in instructing the jury because the instructions created a fatal variance. He also asserts that the district court erred in concluding that his convictions for stalking and violating a no contact order were relevant to his truthfulness.

Statement of the Facts and Course of Proceedings

At around 9:30 p.m. on July 27, 2010, fifteen-year-old A.R. snuck out of her father's house. (Tr., p.179, Ls.7-9.) She snuck out to meet up with Mr. Ormesher, whom she had met at a wedding several days before; Mr. Ormesher was a DJ at the wedding. (Tr., p.187, Ls.14-23.) According to A.R., Mr. Ormesher pulled up in a yellow sports car and she got into the passenger seat. (Tr., p.175, Ls.5-10.) She told him she wanted to go to the woods behind her house, but he stated that he wanted to go somewhere else, and they headed toward Canfield Mountain. (Tr., p.175, Ls.14-18.) She testified that Mr. Ormesher gave her a bottle of Tarantula tequila; she believed that she took about 25-30 sips of the tequila. (Tr., p.175, Ls.21-25, p.180, Ls.12-13.)

They drove for about 15 minutes, talking about "how often I get drunk and stuff." (Tr., p.177, Ls.3-5.) Once they arrived at the trailhead, according to A.R., "we started kissing. He started touching me. I wasn't really okay with it at first but kind of allowed it to happen eventually as I got intoxicated." (Tr., p.179, Ls.19-22.) She testified that Mr. Ormesher touched her breasts under her shirt and bra; he was in the driver's seat leaning over and she was in the passenger seat. (Tr., p.181, Ls.1-23.) She believed

that this went on for about a half an hour, "but I started fogging out and blacking out so I couldn't really tell you." (Tr., p.182, Ls.7-9.)

When the police arrived, A.R.'s shirt and bra were off; she did not recall how that happened. (Tr., p.182, Ls.15-24.) A.R. could not recall her name when the police spoke to her; she was puking. (Tr., p.183, Ls.4-10.) An ambulance was eventually called to scene due to A.R.'s condition. (Tr., p.183, Ls.19-22.) A.R. was questioned about what happened that evening; "I didn't know if I was going to be like prosecuted for it or – I was kind of scared so I told them nothing had happened, we were just drinking." (Tr., p.184, Ls.9-11.) She got in trouble with her parents for sneaking out, and told her mother within the next day or two that an inappropriate touching occurred. (Tr., p.203, Ls.15-22.)

Mr. Ormesher testified. He stated that on the evening in question, he received a text message from A.R., and she eventually asked him to come pick her up. (Tr., p.254, Ls.7-9.) He testified that she was the one who brought the bottle of tequila and suggested they go to the trailhead. (Tr., p.255, L.1 – p.257, L.5.) She had already been drinking when he picked her up. (Tr., p.257, Ls.8-10.)

Mr. Ormesher testified that he did not kiss A.R., "because she was starting to get too drunk." (Tr., p.261, Ls.17-19.) He eventually took the bottle of tequila away from her and gave her water. (Tr., p.261, Ls.20-25.) When asked how her shirt came off, Mr. Ormesher stated,

> After I had given her the water, she got out the car and she went to go pee, and she actually fell down the hill and I had to go get her, and then she got back in the car, and I said, 'Now you stay there,' and then she took her shirt off, but then she – I told her, 'No, put that back on,' so she put it back on.

(Tr., p.262, Ls.12-17.) She did take her bra off, but did not say why, as she was not speaking coherently by that time. (Tr., p.263, Ls.1-6.) Mr. Ormesher stated that when he first arrived at the trailhead he applied the emergency break because the car would roll otherwise. (Tr., p.264, Ls.20-23.) With the emergency break applied, it was "pretty much impossible" to lean over the middle console to the passenger seat. (Tr., p.265, Ls.11-13.) Mr. Ormesher testified that he never leaned over the emergency break and touched A.R. (Tr., p.265, Ls.14-16.) He testified that he never took advantage of A.R. and believed that he "took care of her." (Tr., p.267, Ls.24-25.)

During the defense case, Mr. Ormesher's uncle, Curtis, testified. When asked if he had an opinion as to whether Mr. Ormesher was a "moral person," he responded:

> Absolutely. I trust him – I'm semi-reclusive, and he's one of the only people I would trust in my home when I take vacations. I trust him to watch my cats. I trust him with everything. We go on jobs for some pretty high-end clientele. Uh, I trust him in their offices, in their homes, and they trust him, also. He doesn't pry into things. He's just trustworthy.

(Tr., p.360, Ls.2-8.) The State then sought to ask Curtis if his opinion would change knowing that Mr. Ormesher had been convicted of stalking and violating a no-contact order. (Tr., p.364, Ls.10-20.) Mr. Ormesher objected, asserting that such incidents were not relevant to credibility and therefore not appropriate for cross-examination. (Tr., p.365, Ls.21-25.) The district court overruled the objection, holding that, "both of these offenses are probative as to the issue of honesty of the defendant," and were highly probative. (Tr., p.367, Ls.6-14.)

Mr. Ormesher was charged with one count of sexual abuse of a child under the age of sixteen years and one count of dispensing to a minor. (R., p.39.) Regarding the first count, the Information specifically alleged:

> That the Defendant, KEVIN LOUIS ORMESHER, over the age of eighteen, to-wit: 25 years of age, on or about the 27th day of July, 2010, in

> the County of Kootenai, State of Idaho, did have sexual contact with A.R., a child under the age of sixteen, to-wit: 15 years old, by touching the breast of said child with the intent to gratify the sexual desire of the Defendant.

(R., p.40.) The Information thus specifically alleged the manner in which Mr. Ormesher allegedly committed the instant offense: by touching the breast of A.R. (R., p.40.) However, the elements instruction submitted to the jury did not contain this information. The instruction stated,

> In order for the defendant, KEVIN LOUIS ORMESHER, to be guilty of Sexual Abuse of a Child Under the Age of Sixteen Years, as charged, the state much prove each of the following:
>
> 1. On or about the 27th day of July, 2010;
> 2. In the State of Idaho;
> 3. The defendant, KEVIN LOUIS ORMESHER, had sexual contact with A.R. not amounting to lewd conduct;
> 4. The defendant, KEVIN LOUIS ORMESHER, was eighteen (18) years of age or older;
> 5. A.R. was under sixteen (16) years of age, and;
> 6. The defendant, KEVIN LOUIS ORMESHER, committed such an act with the specific intent to gratify the sexual desire of the defendant.

(R., p.126.) "Sexual contact" was defined as "any physical contact between the child and any person which is caused by the actor, or the actor causing the child to have self contact." (R., p.129.) Thus, pursuant to the jury instruction, the jury could have found Mr. Ormesher guilty of sexual abuse of a minor even if it did not find that he touched A.R.'s breast, even though this was specifically the act alleged in the Information.

Mr. Ormesher objected to the use of the jury instruction, asserting that, because the charging document specifically set forth the manner in which Mr. Ormesher had allegedly committing the crime, the jury instruction created a variance because it

permitted him to be convicted by committed the crime in a different manner than what was alleged. (Tr., p.285, L.18 – p.287, L.13.) The court used the instruction. (R., p.126.)

Mr. Ormesher was convicted. (R., p.140.) The district court imposed a unified sentence of six years, with two years fixed, and the court retained jurisdiction. (R., p.157.) Mr. Ormesher appealed. (R., p.160.) He asserts that the district court erred in instructing the jury and erred by permitting the State to cross-examine Mr. Ormesher's uncle regarding Mr. Ormesher's convictions.

ISSUES

1. Did the district court err in instructing the jury because the jury instructions created an impermissible variance from the charging document?

2. Did the district court err by permitting the State to cross-examine Curtis Ormesher regarding Mr. Ormesher's prior convictions?

ARGUMENT

I.

The District Court Erred In Instructing The Jury Because The Jury Instructions Created An Impermissible Variance From The Charging Document

A. Introduction

The Information in this case specifically alleged that Mr. Ormesher committed sexual abuse of minor by touching A.R.'s breasts. However, the elements instruction contain no such limitation – it permitted the jury to find Mr. Ormesher guilty based on any act of sexual contact. This created a variance.

B. Standard Of Review

Whether the jury was properly instructed is a question of law over which the appellate courts of this state exercise free review. *State v. Jones*, 125 Idaho 477, 489 (1994); *State v. Sundquist*, 128 Idaho 780 (Ct. App. 1996). "The existence of an impermissible variance between a charging instrument and jury instructions is a question of law over which we exercise free review." *State v. Sherrod*, 131 Idaho 56, 57 (Ct. App. 1998).

C. The District Court Erred In Instructing The Jury Because The Jury Instructions Created An Impermissible Variance From The Charging Document

Mr. Ormesher was charged with one count of sexual abuse of a child under the age of sixteen years and one count of dispensing to a minor. (R., p.39.) Regarding the first count, the Information specifically alleged:

> That the Defendant, KEVIN LOUIS ORMESHER, over the age of eighteen, to-wit: 25 years of age, on or about the 27th day of July, 2010, in the County of Kootenai, State of Idaho, did have sexual contact with A.R., a child under the age of sixteen, to-wit: 15 years old, by touching the

> breast of said child with the intent to gratify the sexual desire of the Defendant.

(R., p.40.) The Information thus specifically alleged the manner in which Mr. Ormesher allegedly committed the instant offense: by touching the breast of A.R. (R., p.40.) However, the elements instruction submitted to the jury did not contain this information. The instruction stated,

> In order for the defendant, KEVIN LOUIS ORMESHER, to be guilty of Sexual Abuse of a Child Under the Age of Sixteen Years, as charged, the state much prove each of the following:
>
> 7. On or about the 27th day of July, 2010;
>
> 8. In the State of Idaho;
>
> 9. The defendant, KEVIN LOUIS ORMESHER, had sexual contact with A.R. not amounting to lewd conduct;
>
> 10. The defendant, KEVIN LOUIS ORMESHER, was eighteen (18) years of age or older;
>
> 11. A.R. was under sixteen (16) years of age, and;
>
> 12. The defendant, KEVIN LOUIS ORMESHER, committed such an act with the specific intent to gratify the sexual desire of the defendant.

(R., p.126.) "Sexual contact" was defined as "any physical contact between the child and any person which is caused by the actor, or the actor causing the child to have self contact." (R., p.129.)

"The instructions to the jury must match the allegation in the charging document **as to the means by which a defendant is alleged to have committed the crime charged**." *State v. Folk*, 151 Idaho 327, 342 (2011) (citing *State v. Hooper,* 145 Idaho 139, 147 (2007) (emphasis added)). "Otherwise, there can be a fatal variance between the jury instructions and the charging document." *Id.* "Also, the jury instruction must not permit the defendant to be convicted of conduct that does not constitute the type of

crime charged." *Id.* In this case, the State alleged that Mr. Ormesher committed sexual abuse by touching A.R.'s breasts. The jury instruction contained no restriction on the type of sexual contact that could be used to convict Mr. Ormesher. The instruction, therefore, did not match the allegation in the charging document and it created a variance.

A determination of whether a variance is fatal depends on whether the basic functions of the pleading requirement have been met. *State v. Windsor,* 110 Idaho 410, 417, (1985). A charging instrument meets the basic functions of the pleading requirement if it fairly informs the defendant of the charges against which he or she must defend and enables him or her to plead an acquittal or conviction in bar of future prosecutions for the same offense. *United States v. Bailey,* 444 U.S. 394, 395, (1980). Therefore, a variance between a charging document and a jury instruction requires reversal only when it deprives the defendant of his or her right to fair notice or leaves him or her open to the risk of double jeopardy. *See, e.g., Windsor,* 110 Idaho at 417-18; Thus, a variance between the facts alleged in the pleading instrument and the proof at trial generally will not be deemed fatal unless there has been such a variance as to affect the substantial rights of the accused. *Id.* A review of whether the defendant was deprived of his or her right to fair notice requires the court to determine whether the record suggests the possibility that the defendant was misled or embarrassed in the preparation or presentation of his or her defense. *Windsor,* 110 Idaho at 418.

Mr. Ormesher was prejudiced. The charging document put Mr. Ormesher on notice that he had to defend against an allegation that he touched A.R.'s breasts. However, due to the jury instruction, he had to defend against an allegation that he touched A.R. at all with the intent to gratify his sexual desire. He could have, therefore,

been found guilty simply by touching or kissing A.R. even if the jury did not believe that he touched her breasts.

Further, the Idaho Supreme Court has stated:

> As stated by the United States Supreme Court in *Berger v. United States*, 295 U.S. 78, 82, (1935): "The true inquiry . . . is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense."
>
> Thus, under the prevailing state standard, a variance is held to require reversal of the conviction only when it deprives the defendant of his right to fair notice or leaves him open to the risk of double jeopardy.

Id. at 417-18, 716 P.2d at 1189-90 (emphasis added.)

"The double jeopardy clause protects against a second prosecution for the same offense after acquittal, protects against a second prosecution for the same offense after conviction, and protects against multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977)." *State v. Pizzuto*, 119 Idaho 742, 756, 810 P.2d 680, 694 (1991), *overruled on other grounds, State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991) (emphasis added.) By not requiring the jury to make a conclusion on the manner in which Mr. Ormesher committed the crime, the court left Mr. Ormesher open to the risk of double jeopardy because it is not clear what specific act Mr. Ormesher was convicted of. The variance in this case was, therefore, fatal.

II.

The District Court Erred by Permitting The State To Cross Examine Curtis Ormesher Regarding Mr. Ormesher's Prior Convictions

A. Introduction

Mr. Ormesher asserts that the district court erred in concluding that his convictions for stalking and violating a no-contact order were relevant to his truthfulness. The district court therefore erred by permitting the State to cross-examine Curtis Ormesher with these convictions.

B. Standard Of Review

The district court should apply a two-prong test to determine whether evidence of the prior conviction should be admitted: (1) the court must determine whether the fact or nature of the conviction is relevant to the witness' credibility; and, (2) if so, the court must determine whether the probative value of the evidence outweighs its prejudicial impact. *State v. Thompson,* 132 Idaho 628, 630 (1999).

In reviewing the district court's determination as to the first prong concerning relevance, the standard of review is *de novo. Id.* In reviewing the district court's decision as to the second prong concerning whether the probative value of the evidence outweighs its prejudicial impact, the standard of review is abuse of discretion. *Id.*

C. The District Court Erred by Permitting The State To Cross Examine Curtis Ormesher Regarding Mr. Ormesher's Prior Convictions

In this case, Curtis Ormesher testified that, in his opinion, Mr. Ormesher was trustworthy. (Tr., p.360, Ls.2-8.) Idaho Rule of Evidence 405(a) provides,

> **Reputation or opinion**. In all cases in which evidence of character or a trait of a character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On

> cross-examination, inquiry is allowable into relevant specific instances of conduct.

I.R.E. 405(a). Mr. Ormesher asserts that the district court erred in finding evidence of the prior convictions were relevant to cross-examination.

The district court found that "both of these offenses are probative as to the issue of honesty of the defendant and this witness's, Mr. Curtis Ormesher's knowledge regarding his opinion that's already stated as to the trustworthiness and honesty of the defendant." (Tr., p.367, Ls.6-14.) The district court erred.

In the context of I.R.E 609,[1] in *State v. Ybarra,* 102 Idaho 573, 634 P.2d 435 (1981), the Idaho Supreme Court recognized that different felonies have different degrees of probative value on the issue of credibility. "Some, such as perjury, are intimately connected with that issue; others, such as robbery and burglary, are somewhat less relevant, and 'acts of violence . . . generally have little or no direct bearing on honesty and veracity.'" *Id.* at 580-81. The Court has further stated that "[t]he determination whether evidence of a particular felony conviction is relevant to credibility depends on the particular facts and circumstances of each case and must therefore be decided on a case-by-case basis." *State v. Bush*, 131 Idaho 22, 31 (1997). The case-by-case analysis referred to in Bush requires an "examination of the statute under which the conviction which category the conviction falls, rather than "a record to be made of the circumstances supporting conviction of the prior offense." *State v. Muraco*, 132 Idaho 130, 133 (1998).

Pursuant to I.R.E. 609, the district court must apply a two-prong test to determine whether evidence of the prior conviction should be admitted: (1) the court must

determine whether the fact or nature of the conviction is relevant to the witness' credibility; and, (2) if so, the court must determine whether the probative value of the evidence outweighs its prejudicial impact. *State v. Thompson,* 132 Idaho 628, 630, 977 P.2d 890, 892 (1999). In this case, the district court held that the offenses were relevant to Mr. Ormesher's credibility and were highly probative. (Tr., p.367, Ls.6-14.) The district court erred.

Stalking and violating a no-contact order are not relevant to a witness's truthfulness. In this case, the State made no offer of proof, and the district court made no finding, that either the alleged stalking or no-contact order violation were committed by deceitful means. In Idaho, a violation of a no contact order is committed when:

> (a) A person has been charged or convicted under any offense defined in subsection (1) of this section; and
>
> (b) A no contact order has been issued, either by a court or by an Idaho criminal rule; and
>
> (c) The person charged or convicted has had contact with the stated person in violation of an order.

I.C. § 18-920(2). Nothing in this statute suggests deceit is required by the violation of a no contact order.

The State represented that Mr. Ormesher had been convicted of misdemeanor stalking in Nevada. Nevada has the following definition of stalking:

> person who, without lawful authority, willfully or maliciously engages in a course of conduct that would cause a reasonable person to feel terrorized, frightened, intimidated, harassed or fearful for the immediate safety of a family or household member, and that actually causes the victim to feel terrorized, frightened, intimidated, harassed or fearful for the immediate safety of a family or household member, commits the crime of stalking.

---

[1] While this case does not directly involve Rule 609, the district court specifically ruled that Mr. Ormesher's prior convictions were relevant to his truthfulness, and, therefore, analysis of whether a conviction would be admissible pursuant to Rule 609 is helpful.

> Except where the provisions of subsection 2 or 3 are applicable, a person who commits the crime of stalking:
>
> (a) For the first offense, is guilty of a misdemeanor.
>
> (b) For any subsequent offense, is guilty of a gross misdemeanor.

Nev. Rev. Stat. Ann. § 200.575. Again, nothing in this statute suggests that deceit is required. In fact, the statute requires that the victim actually feel "terrorized, frightened, intimidated, harassed, or fearful," therefore requiring the defendant to make his or her behavior known.

Unlike crimes like perjury or theft, which are inherently dishonest, the crimes the State used to cross-examine Curtis Ormesher were not relevant to his reputation for honesty. Nothing in the statutes demonstrates that the crimes are committed by deceit. Because of this, the district court erred by concluding that the prior convictions were relevant to Mr. Ormesher's truthfulness.

CONCLUSION

Mr. Ormesher respectfully requests that his conviction be vacated and his case remanded for further proceedings.

DATED this 31st day of January, 2012.

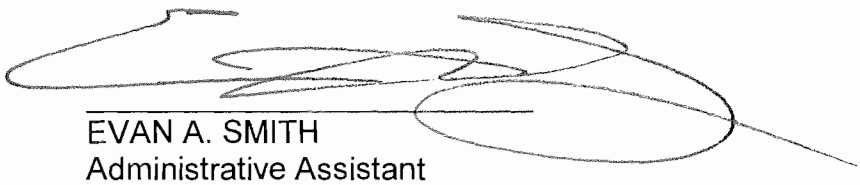
JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 31st day of January, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JOHN T MITCHELL
DISTRICT COURT JUDGE
E-MAILED BRIEF

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand delivered to the Attorney General's mailbox at the Supreme Court



EVAN A. SMITH
Administrative Assistant

JMC/eas